STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 27, 2007
v	No. 267086 Wayne Circuit Court
TERRANCE DONALD MERRITT, Defendant-Appellant.	LC No. 05-008246-02

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

The trial court convicted defendant of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. For the reasons set forth below, we affirm.

I. Sufficiency of the Evidence

Defendant claims that the prosecution presented insufficient evidence to convict him of possession with intent to deliver marijuana. We review claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

To establish the crime of possession with intent to deliver less than five kilograms of marijuana, the prosecution must show that the defendant knowingly possessed a controlled substance and intended to deliver it to someone else, the substance possessed was marijuana and the defendant knew it was marijuana, and that the marijuana was in a mixture that weighed less than five kilograms. MCL 333.7401(2)(d)(iii); *People v Williams*, 268 Mich App 416, 419-420; 707 NW2d 624 (2005).

Defendant contends that he sat at a table that had marijuana on it, but that this does not prove possession. However, possession can be actual or constructive. *Williams*, *supra* at 421-422, citing *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992). If a defendant knows the controlled substance is present and has the right to exercise control over it, then the defendant has constructive possession of it. *Id*. Furthermore, ownership is not a necessary element of possession, and two or more defendants can have simultaneous constructive possession of the same controlled substance. *Id*.

Here, defendant sat at a dining room table on which there were large amounts of marijuana, a gun, and money. Defendant had control over the marijuana when he was sitting next to it. That his codefendant also sat at the table is not dispositive because control over the marijuana need not be exclusive. On the other hand, other people in the house who were upstairs at the time of the raid did not have control over the marijuana.

Defendant avers that someone else could have possessed the marijuana. Specifically, defendant asserts that the police informant who bought the marijuana gave only a general description of the seller, evidence showed that the raided house belonged to someone named "Jim," there were other people in the house on the day of the raid, and some of those people possessed large sums of cash.

While someone named "Jim" may own the house, defendant received his mail at that house and was, therefore, a resident. Further, defendant matched the description of the seller from the purchase made by the police informant. And, while there may have been several other people in and out of the house on the day of the raid and any one of them may have possessed or owned the marijuana, the prosecution does not need to "negate every reasonable theory consistent with the defendant's innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide."[1] *People v Daoust*, 228 Mich App 1, 15-16; 577 NW2d 179 (1998).

Defendant also claims that the prosecution presented insufficient evidence to convict him of felony-firearm. The elements of felony-firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003).

Defendant contends that, under *People v Terry*, 124 Mich App 656, 663; 335 NW2d 116 (1983), he had to have physical possession of a firearm and the gun was not in his hands or on his person. However, *Terry* states that a person may also possess a firearm during a felony if a weapon is available and accessible to the person during the felony. *Id*. Here, defendant was seated at a table that had a gun on it. The table was small, according to trial testimony. Thus, the gun was available to and accessible by defendant during the commission of the crime of possession with intent to deliver marijuana.

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[1] Defendant argues that, pursuant to *People v Davenport*, 39 Mich App 252; 197 NW2d 52 (1972), several people sharing a house is an insufficient nexus to convict them all for drugs found in the house. In *Davenport*, the evidence was entirely circumstantial and, at the time *Davenport* was decided, the rule was that in circumstantial cases "the prosecution had the burden of proving that there was no innocent theory possible that would without violation of reason accord with the facts." *Id*. at 256. Today, Michigan law requires that the prosecution need only prove its own theory beyond a reasonable doubt. *Daoust*, *supra* at 15-16. Regardless, *Davenport* is clearly distinguishable because, here, there is both direct and circumstantial evidence. Moreover, in *Davenport*, the police found the narcotics in a barrel in the basement of the house while, here, defendant was sitting at the table with the marijuana.

Defendant further contends that this case is similar to *People v Myers*, 153 Mich App 124, 125-126; 395 NW2d 256 (1986), in which the defendant claimed that a plea bargain offer to drop a felony-firearm charge was illusory because he could not have been convicted of felony-firearm. This Court agreed because the firearms were not accessible or available to defendant when was handcuffed and surrounded by police and the guns were in a gun cabinet in his upstairs bedroom at the time of his arrest for possession with intent to deliver marijuana. *Id*. Defendant contends that, similar to *Myers*, he was at the back door when police apprehended him, and the gun was on the dining room table.

In *Myers*, the guns were in a gun cabinet and, here, the gun was within defendant's reach while he was preparing marijuana for delivery. The *Myers* defendant owned the guns in the cabinet, but he did not possess them during the commission of the felony. Here, the marijuana and the gun were both on the dining room table at which defendant sat moments before his arrest. Accordingly, a jury could reasonably conclude that defendant possessed a firearm while simultaneously possessing marijuana with the intent to deliver.

Defendant further asserts that, according to Shenita Tate's testimony and Officer Todd Eby's preliminary complaint record (PCR), defendant was upstairs when the police arrived, so he could not have been at the dining room table. However, Officer Eby testified that defendant was downstairs when he was apprehended and defendant may have incorrectly read the report because of a punctuation error. The trial court chose to believe Eby but not Tate and it is for the trier of fact to determine the credibility of witnesses. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Viewing the evidence in the light most favorable to the prosecution, we hold the evidence was sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of possession with intent to deliver marijuana and felony-firearm.

II. Great Weight of the Evidence

Defendant claims that the trial court erred when it denied his motion for a new trial on the ground that his convictions were against the great weight of the evidence.[2]

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[2] We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the result is outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231, on rem 258 Mich App 679; 672 NW2d 533 (2003). A trial court's factual findings are reviewed for clear error. MCR 2.613(C).

A new trial may be granted if a verdict is contrary to the great weight of the evidence. MCR 2.611(A)(1)(e); *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003); *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*.

A verdict is contrary to the great weight of the evidence only under exceptional circumstances, *People v Lemmon*, 456 Mich 625, 643-644, 647; 576 NW2d 129 (1998), for example, where "'testimony contradicts indisputable facts or laws'" (quoting *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992)), where "'a witness's testimony is so patently

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Defendant specifically asserts that Officer Eby's testimony contradicted what he wrote in his PCR. Eby wrote that he "froze def's along with (4) other [black males] and a [black female] in the upstairs north west bedroom." Defendant interprets this to mean that defendant and codefendant were in the upstairs bedroom along with others and, therefore, defendants could not have been at the dining room table. Officer Eby testified that he should have put a comma after "froze def's," which would make it clear that defendants were apprehended in one location and the others were apprehended in the upstairs bedroom. However, when taken in context with the remainder of the PCR, which plainly states that defendant was sitting at the table with the drugs and gun when Officer Eby entered, it is clear that defendant and codefendant were not upstairs at the time of the raid.

Alternatively, defendant argues that Officer Valdez and Officer Salazar stated in their PCRs that all of the occupants of the home were in the dining room, and therefore, defendant and codefendant would not have been the only ones near the gun and marijuana. However, defendant misinterprets the PCRs. While the PCRs state that the officers detained all of the occupants in the dining room, the five people in the upstairs bedroom were not brought downstairs and into the dining room until after the house was secure, and defendant and codefendant were already detained in the dining room. When read in context, the PCRs logically describe the sequence of events and the officers' writings simply describe different circumstances that occurred at different times during the raid.

We hold that the trial court did not abuse its discretion by denying defendant's motion for a new trial on the ground that the convictions were contrary to the great weight of the evidence.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kurtis T. Wilder

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implausible it could not be believed by a reasonable juror'" (quoting *People v Garcia*, 978 F2d 746, 748 (Ca 1, 1992)), or "where the witnesses [sic] testimony has been seriously 'impeached' and the case marked by 'uncertainties and discrepancies'" (quoting *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985)). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647.